

*Helping Credit Unions Serve Their Members*

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July 19, 2002

Chief of Records  
ATTN: Request for Comments  
Office of Foreign **Assets** Control  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

**RE: Proposed Public Disclosure of OFAC Penalties**

To Whom It May Concern.

The Michigan Credit Union League (**MCUL**) appreciates the opportunity to provide comments to the Office of Foreign Assets Control (**OFAC**) concerning the **proposed public disclosure** of penalties. **MCUL** is a trade association representing over 90% of state and federally chartered credit unions in the state of Michigan.

**MCUL** appreciates the efforts of **OFAC** to increase public awareness of its enforcement activities and to encourage compliance with its sanctions programs. However, **MCUL** does not support these proposed changes and offers further suggestions more fully discussed herein.

**public Disclosure of Civil Penalties Information**

**OFAC** is proposing to make certain information available to the public on at least a quarterly basis. This information would relate to proceedings against an entity that resulted in either the imposition of a civil monetary penalty or an informal settlement and would include: (1) the name of the entity involved; (2) the sanctions program involved; (3) a brief description of the violation or alleged violation; and (4) the amount of the penalty imposed or the amount of the agreed settlement. According to the proposal, the information would be posted on the **OFAC** Web site.

**MCUL** strongly supports the goals of the current **OFAC** compliance program and recognizes the important role that it plays in the war on terrorism. **MCUL** would like to commend **OFAC** for its responsiveness to financial institution inquiries and concerns over the past few months and hopes to continue strengthening its working relationship with **OFAC** staff.

However, **MCUL** does not support this proposal for various reasons. First, even though the civil penalty information would only be posted after a penalty has been assessed or an informal settlement has been reached, **MCUL** believes that the potential for reporting erroneous information exists. Before erroneous information can be retracted, reputational harm could be done to the entity involved. Further, it is manifestly unfair to heap reputational harm on top of civil penalties already assessed for a financial institution that, despite having a comprehensive compliance program in place, makes an honest mistake. If the name of the organization is posted, substantial reputational harm could be done to the organization, regardless of whether it was making a concerted effort to comply with the regulations. **MCUL** believes that the current potential fines alone are enough to encourage would-be violators to comply with the regulations. The posting of civil penalty information could inflict unnecessary harm, in light of the fact that **OFAC** administers a daunting array of highly technical and often misunderstood laws, regulations, and executive orders.

Second, MCUL believes that the posting of civil penalty information on the OFAC Web site will not enhance public awareness of the Agency's enforcement activities. Since the content of the OFAC Web site is primarily for those organizations that are already complying with the OFAC regulations, any posted information will most likely only be seen by those organizations. Therefore, MCUL does not believe that the posting of civil penalty information on the OFAC Web site will increase the public's awareness of the OFAC enforcement activities.

Third, the public posting of information on civil penalties and informal settlements may provide a disincentive for organizations to enter into settlement agreements. Rather than fostering quick resolution of alleged OFAC compliance violations, this will likely result in a dramatic increase in litigation contesting any allegation of wrongdoing. Currently, while settlements tend to be reached relatively quickly, if the threat of serious reputational injury exists, financial institutions may make the logical business decisions to contest alleged violations.

Fourth, it is quite likely that the national media would monitor this information. MCUL is concerned that the media will not appreciate the complex web of OFAC compliance obligations currently imposed on financial institutions. The proposed rule states that a "brief description of the violation or alleged violation" would be posted on the OFAC Web site. This leads one to believe that the current compliance efforts of the financial institution may not be fully reported on the Web site. It would be extremely unfair to report such information, while engendering substantial reputational risk to the financial institution, without reporting the "full story" (i.e., whether or not the institution had an OFAC compliance program in place, whether the institution attempted to obtain guidance from the OFAC Hotline, etc.). The OFAC regulations, a highly complicated series of executive orders, laws and regulations with serious penalties, require financial institutions to make "on the spot" decisions in many cases. If the institution fails to make the correct decision, often involving a "gray area" of OFAC compliance, even if the transaction is ultimately stopped before it reaches its final destination, the institution may still be assessed a stiff penalty and, under the proposal, may have its name posted on the OFAC Web site. MCUL is concerned that a "brief description" of the violation would not adequately describe the institution or the institution's compliance efforts, especially if the media reports the information without being aware of the oftentimes unclear OFAC compliance obligations on financial institutions.

Fifth, the posting of names of organizations that have been subject to civil penalties may make it easier for terrorist groups to determine which parts of their terrorist networks have been discovered. Rather than "cracking down" on OFAC violators, the posting of such information may make it easier for terrorists to divert their funds away from organizations that are strengthening their OFAC compliance procedures as the result of the imposition of a civil penalty.

Finally, since the information OFAC is proposing to publicly post is currently available to the public under the Freedom of Information Act, MCUL believes that the potential for harm as a result of these proposed postings would outweigh the potential benefit of quicker, easier public access to this information.

#### Other Comments

MCUL would also like to take this opportunity to provide OFAC with feedback from many credit unions in Michigan on the current OFAC Regulations for the Financial Community and the difficulties associated with compliance. First of all, MCUL is concerned that the penalties for both willful and/or negligent conduct are too severe. *Negligent* violations should be subject to far less penalties. If they are not reduced, OFAC runs the risk of diminishing its compliance efforts because no one will willingly take on the position of a financial institution OFAC compliance officer when there is the chance that the financial institution, as well as the individual, could face such stiff penalties for even a *negligent* violation. The penalties also provide the Agency with too much discretion, so that in times of national crisis, it may become overly aggressive in its assessment of these penalties.

MCUL encourages OFAC to conduct a comprehensive review of the penalties associated with OFAC violations and report its findings to the Administration and to Congress in an effort to make the penalties more uniform and reasonable. For example, the Bank Secrecy Act, which has similar ramifications for national security, has stiff penalties too; however, they are much lower than the penalties associated with OFAC violations. A pattern of negligent violations of the Bank Secrecy Act could result in a \$50,000 fine. If a Currency Transaction Report is not filed as required within 15 days of the completion of a transaction, a financial institution can be fined \$10,000 per day for each day a required report is not filed. These penalties are lower than those for violations of OFAC regulations, but they are still significant enough to deter even large financial institutions from non-compliance. MCUL encourages OFAC to conduct a review of the civil and criminal penalties for OFAC violations and make recommendations on how they can be made more uniform and reasonable.

Second, current technology limitations make compliance with the regulations difficult. For example, in order to comply with the OFAC regulations, financial institutions are required to monitor all payees and payors on share drafts/checks. Operationally, this is next to impossible when one considers the volume of checks that are processed electronically and manually through the banking system each day.

MCUL is also concerned that the OFAC regulations do not take into account the current cost of technology. Unless credit union staff can develop a system on their own to compare the names on the Specially Designated Nationals (SDN) list with the names of credit union members and others, the credit union is forced to contract with a third party vendor to effectively monitor the SDN list. These contracts can be costly. For example, for a credit union with \$300 million in assets, the annual fee for the Bridger OFAC Tracker<sup>®</sup> product is \$800. While this may not be considered a substantial fee for larger institutions, smaller institutions are especially burdened by this cost because they generally have fewer resources to set aside for compliance. For example, for a credit union with \$10 million in assets, the annual price for the above-referenced product is only lowered to \$700. MCUL strongly encourages OFAC to develop a free tool, which can be automatically updated as changes to the list are made, for all financial institutions to use to effectively monitor the OFAC SDN list.

Third, MCUL believes that enhanced operational OFAC compliance guidelines for financial institutions would greatly increase compliance with the regulations. MCUL has heard many examples of credit union staff calling the OFAC Hotline or looking to the OFAC regulations for specific operational guidance, and none was forthcoming. As a result, there are a number of unresolved issues and "gray areas" associated with financial institution OFAC compliance. The following are some examples of where further operational guidance is needed:

- If the credit union OFAC compliance officer leaves a message on the OFAC Hotline voice mail because he/she has discovered a credit union member's name that matches a name on the SDN list, it is unclear what the officer should do if an OFAC staffer does not return the credit union's phone call for multiple days and the member in question continues to withdraw and deposit funds into his/her account.
- It is unclear how close a SDN list "hit" has to be, even if a financial institution uses filtering software, in order to be reported. OFAC has been noticeably silent on this issue. Should financial institutions report "hits" with one-digit variations, but not those with two-digit variations? Or should they only report exact matches? Some point of reference is needed, instead of just instructing the institution to call the OFAC Hotline if it has a question.
- OFAC Hotline staff has indicated to financial institutions that, even if they have an exact match between a member's name and a name on the SDN list, they should do some "reasonable" checking before calling the Hotline. However, there is limited information on the SDN list. If the name in question is a relatively common name, like "John Smith" for example, should the institution check to

see if the person has been a member for multiple years and has a local address? If the credit union can confirm that the person has a local address and is a longstanding member, and the SDN list information states that the named person has residence in Afghanistan, is the credit union not required to report the match? Most institutions would rather be safe than sorry and will still call the OFAC Hotline. However, the Agency needs to develop specific guidance in this area if it does not want institutions to call, even when they have an exact match, if they can confirm additional information about the person.

- Many credit unions have concerns about safety issues associated with OFAC compliance. For example, let's say that a credit union scans names of its members against the SDN list and finds an exact match. The credit union's OFAC compliance officer calls the OFAC Hotline and is instructed to block the funds in that person's account. However, what should the credit union do if the person returns to the credit union later that day and attempts to withdraw funds from his/her account? If the person becomes hostile, the credit union will have serious safety concerns. OFAC staff needs to clearly explain to financial institutions how to handle these situations so as to minimize such risk.
- Credit unions need clarification on the issue of liability. For example, if the credit union's filtering software discovers a close, but not exact, match with a name on the SDN list, the credit union compliance officer will report the match to OFAC. If OFAC Hotline staff informs the credit union that the name is not an accurate match with the name on the SDN list, but later it turns out that the name is an accurate match, the credit union should not be liable for the mistake. However, the liability in this situation is not clear in the OFAC regulations. How can the credit union effectively document its discussion with OFAC Hotline staff in order to limit its liability?

MCUL encourages OFAC to develop a "safe harbor" for credit unions that contact the OFAC Hotline if they have questions. For example, if the credit union OFAC compliance officer leaves a voice message on the OFAC Hotline concerning a potential match with a name on the SDN list, the credit union should not be subject to penalties for noncompliance if the member in question continues to withdraw and deposit funds into and out of his/her account. Likewise, the credit union should not incur additional liability or be held responsible if OFAC staff informs the credit union compliance officer that a match is not accurate, if later it appears that the match was accurate.

More specific guidance on how to comply with the regulations would greatly increase the effectiveness of credit union compliance efforts. MCUL encourages OFAC to (1) develop more comprehensive guidance and/or a set of Frequently Asked Questions based on incoming questions on the OFAC Hotline from financial institutions, and (2) develop a compliance grid for financial institutions to use in order to move away from the current reliance on reading the entire set of OFAC regulations or calling the OFAC Hotline.

### Conclusion

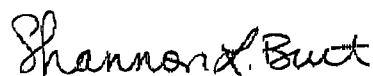
Again, MCUL appreciates the efforts of OFAC to increase public awareness of and compliance with its regulations. However, MCUL does not support the proposed changes because (1) entities' names could be posted erroneously or for a simple mistake, which could cause substantial reputational harm to be done to that organization, (2) the posting of civil penalty information on the OFAC Web site will not increase the public's awareness of its enforcement activities, (3) the posting of such information may provide a disincentive for organizations to enter settlement agreements, (4) a "brief description" of the violation on the OFAC Web site would not adequately describe the named institution's compliance efforts, especially if the media reports the information without being aware of the oftentimes unclear OFAC compliance obligations imposed on financial institutions, and (5) the posting of names of organizations that have been subject to civil penalties may make it easier for terrorist groups to determine which parts of their terrorist networks have been discovered.

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In addition, MCUL strongly encourages OFAC to (1) conduct a comprehensive review of the penalties for violations of its regulations and report these findings to Congress, (2) develop a free tool for all financial institutions to use to effectively monitor the SDN list, (3) develop a "safe harbor" provision for institutions that contact the OFAC Hotline, and (4) offer more specific guidance clarifying how financial institutions can comply with the OFAC regulations, taking into account available technology resources.

We thank you for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "Shannon L. Burt".

Shannon L. Burt  
Regulatory Specialist

cc: Credit Union National Association